83-1210

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN PUGIOTI,

Petitioner.

— v. —

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

QUESTIONS PRESENTED

1. Whether petitioner, a paraplegic, was deprived of his rights to the assistance of counsel of his own choice, and of due process of law, in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, when the Trial Court sentenced him, in the absence of counsel, despite the fact that an attorney present in the courtroom with him announced the fact that he was not representing the petitioner?

2. Whether petitioner was denied his rights under the Fifth and Fourteenth Amendments when the Trial Court denied his motion, prior to sentence, to withdraw his plea of guilty to the crimes of attempted murder second degree (two counts)?

3. Whether petitioner was deprived of the effective assistance of counsel by virtue of the fact that he was advised by his then attorney to plead guilty after a highly inflammatory incident occurred in the courtroom during his trial, despite the fact that he claimed he was innocent and did not want to plead guilty?

4. Whether petitioner was deprived of a right to counsel when the court refused to assign counsel after being told Pugioti was without funds?

THE PARTIES

The parties herein are The People of the State of New York and John Pugioti.

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OPINION BELOW

The Appellate Division of the Supreme Court, First Department, affirmed the judgments of conviction without opinion, on the 27th day of September, 1983. Honorable Bernard S. Meyer, Associate Judge of the Court of Appeals of the State of New York, denied leave to appeal without opinion, on the 22nd day of November, 1983.

JURISDICTION

(a) The judgments of conviction were rendered on the 5th day of November, 1982, in the Supreme Court of the State of New York, County of Bronx, before Honorable Barry Salman, Justice. The indictment charged the defendant with two counts of attempted murder second degree. He was sentenced to concurrent terms of 6 to 18 years imprisonment and is presently incarcerated.

(b) The order and judgment of affirmance of the Appellate Division of the State of New York, First Department, is dated the 27th day of September, 1983, and is without opinion. An application was made to the Court of Appeals of the State of New York for leave to appeal to that Court, and that application was denied by Honorable Bernard S. Meyer, Associate Judge, on the 22nd day of November, 1983. Copies of the aforesaid orders are annexed as part of the appendix.

(c) Jurisdiction to review the judgments and orders herein by certiorari is conferred under 28 U.S.C. § 1257 and 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, in pertinent part, provides:

> "No person shall be deprived of life, liberty or property without due process of law."

The Sixth Amendment of the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> "No state shall deprive an accused of life, liberty or property without due process of law."

STATEMENT OF THE CASE

The petitioner herein is a paraplegic and was in that same condition at the time of his indictment and trial. He had retained a lawyer by the name of Michael P. Direnzo, Esq., who had represented him for the purpose of going to trial on the charges herein.

During the trial, but before its conclusion, a very untoward episode occurred, which involved an epileptic seizure by one of the alleged victims of the crime, in open court in the presence of the jury.

According to the minutes of the proceedings of the aborted trial, dated September 30, 1982, Mr. Direnzo, who was still representing the defendant there (petitioner here), made a motion for a mistrial based upon what had occurred the day before in the courtroom, in the presence of everyone including the jury.

Mr. Direnzo recounted that the alleged victim had suffered an epileptic seizure in the courtroom, fell into a convulsive state, and it created pandemonium in the courtroom. The faces of the jurors, Mr. Direnzo recalled, were fearful and astonished, and the entire incident was frightening, devastating, and traumatic!

Mrs. Giambone, the mother of the victim, emitted piercing screams and yelling in a foreign tongue, pulling on her hair, and rushing to the witness chair to get a cup of water.

Mr. Giambone was pounding on a wooden rail on the divider in the courtroom in the front row, nearest the jury box.

As a result of this incident, Mr. Direnzo recommended that the defendant plead guilty. The defendant-petitioner herein indicated he did not want to plead guilty, and stated that he was actually innocent.

Another significant fact which this Court should take into account is that the petitioner in this case is a paraplegic.

At the minutes of plea on October 4, 1982, there is a discussion about affixing artificial limbs to the defendant (p.16).

At the time of sentence (Nov. 5, 1982), the petitioner indicated that he wanted to withdraw his plea and that he had discharged Mr. Direnzo.

The attorney, Direnzo, had notified the Court previously on or about October 29, 1982, that he would not be representing the defendant at the time of sentence. Apparently, the Court made no efforts to replace counsel. Accordingly, sentence was pronounced, over objection, without an attorney present for the defendant-petitioner.

In view of all the circumstances of this case, we shall argue, *infra*, that the Court should have allowed the withdrawal of the plea of guilty of this severely disabled defendant, and/or permitted him to proceed to trial.

It should be noted that prior to sentence the attorney who had been representing Mr. Pugioti up to that period of time, namely Michael P. Direnzo, Esq., informed the court that the defendant had informed the Probation Department and himself that the only reason he had pleaded guilty was on advice of counsel, and not because he actually was guilty. Mr. Direnzo pointed out that it created an awkward situation for him because of that statement.

The Court, during sentence, pointed out that the petitioner had said that the plea was voluntary and that no promises had been made to him when he took the plea. But, it must be borne in mind that this defendant-petitioner, who is a paraplegic, was represented by Michael P. Direnzo, Esq., whom he stated later, and before sentencing, had told him to plead guilty, although he was not guilty.

We believe that at the very least a hearing should have been held, of an evidentiary nature, to determine what actually occurred.

If, in fact, the petitioner pleaded guilty only on advice of counsel and contrary to his own wishes, then we maintain the plea of guilty should be withdrawn.

The plea itself was taken on October 4, 1982, and by the 29th of October, 1982, the Trial Court had already been notified that the defendant-petitioner wanted to withdraw his plea of guilty, and was further informed that Mr. Direnzo was no longer his attorney.

While the Trial Court noted that a Florida lawyer had been in court as a spectator about a week before sentence, that lawyer obviously was never identified as the attorney for petitioner and, indeed, since he apparently was not admitted to the New York bar, could not have represented Pugioti at all.

It is important further to note that Pugioti informed the Court that he could not afford to hire an attorney, but that he certainly did not want Mr. Direnzo to represent him. The colloquy at pages A106-107 of the appendix on the minutes of sentence read as follows:

"THE COURT: *Is the gentleman standing next to you, Mr. Direnzo, is he your attorney?*

"THE DEFENDANT: *No.*

"THE CLERK: He is not your attorney? Okay.

"THE COURT: You have another attorney?

"THE DEFENDANT: Not present, no.

"THE COURT: Do you have another attorney?

"DEFENDANT: No.

"THE COURT: *Have you retained another attorney?*

"DEFENDANT: *I have no money for one.*"

It is further significant to observe that this severely handicapped petitioner was not represented by counsel and that the imposition placed upon him by the Trial Court, that he should serve written papers in order to move to set aside his plea of guilty, was an impossible task for Pugioti because of his disabilities, coupled with the fact that he was without counsel at all and stated he could not afford to hire one.

Since Mr. Direnzo conceded that he himself had been discharged, he felt no obligation to draw up papers seeking to withdraw the plea of guilty.

Thus, at the time of sentence, Pugioti was on the "horns of a dilemma", namely that the Court refused to recognize his dismissal of Mr. Direnzo as his lawyer and, on the other hand, refused to hear his applicaiton to withdraw his plea of guilty because written papers had not been submitted for that purpose.

POINT I

THIS COURT HAS HELD THAT THE ASSISTANCE OF COUNSEL IS ONE OF THE MOST FUNDAMENTAL RIGHTS OF ANY PERSON ACCUSED OF A CRIME AND THIS RIGHT CANNOT BE DIMINISHED OR ABROGATED, EXCEPT UPON CONSCIOUS, PURPOSEFUL, AND INTENTIONAL WAIVER BY THE ACCUSED. IT IS NOT DISPUTED IN THE RECORD THAT AT THE TIME OF SENTENCE PETITIONER HAD NO ATTORNEY AND STATED HE COULD NOT AFFORD TO HIRE ONE.

A plea of guilty is tantamount to a waiver of trial and a full confession of guilt. When that plea, however, has been coerced or articulated without sufficient understanding by the accused, then it should not stand.

This Court has held further that a State must give every criminal defendant a reasonable opportunity to employ counsel (*Chandler v. Fretag*, 348 U.S. 3,99 L.Ed. 4,10; *Gideon v. Wainwright*, 372 U.S. 335,9 L.Ed.2d 799,3 A.L.R.2d 733).

Certainly, where a defendant cannot afford counsel, there is an obligation to provide counsel where a sentence may exceed six months (*Gideon v. Wainwright*, supra; and *Kitchens v. Smith*, 401 U.S. 847,28 L.Ed.2d 519).

It has been held that in the obtaining of guilty pleas, the Court must be extremely careful, since it is far more serious than the taking of an extra-judicial confession.

Thus, in *Machibroda v. United States*, 368 U.S. 487, the Supreme Court of the United States held:

> "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to col-

lateral attack. See *Walker v. Johnston*, 312 U.S. 275; *Waley v. United States*, 316 U.S. 101; *Shelton v. United States*, 356 U.S. 26, reversing, 246 F.2d 571. 'A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. *Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.' Kercheval v. United States*, 274 U.S. 220, 223." (Emphasis ours)

The Sixth Amendment of the United States Constitution guarantees in every criminal prosecution that the "accused shall enjoy the right. . .to have the assistance of counsel for his defense" (see also Fourth Amendment).

The Supreme Court has held the following:

"The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necesary to the lawyer — to the untrained layman may appear intricate, complex and mysterious." (***Johnson v. Zerbst***, 304 U.S. 458, 82 L.Ed. 1461, 146 A.L.R. 357; ***Kitchen v. Smith***, 401 U.S. 847, 28 L.Ed.2d 519; ***Chandler v. Fretag***, 348 U.S. 3, 99 L.Ed. 4, 10; ***Holden v. Hardy***, 169 U.S. 366, 386, 42 L.Ed. 780, 789; and, ***Gideon v. Wainwright***, 372 U.S. 335, 9 L.Ed. 2d 799, 93 A.L.R.2d 733).

We might point out that in the *Kitchens* case, *supra*, the Supreme Court held that the right to counsel does not depend upon a request by the accused. It is mandated upon the Court and applies equally to guilty pleas as well as to trials.

In *United States v. Forlano*, 2 Cir., 319 F.2d 617, the United States Court of Appeals for the Second Circuit reversed a federal district court which had refused to vacate a judgment of conviction, even after the sentence had been served, noting that the absence of counsel was a prerequisite to a valid trial and valid proceedings. The Court of Appeals in reversing stated that the presumption of waiver of counsel could not be lightly inferred. In reversing, in essence, the United States Court of Appeals held that counsel is of such overriding importance that virtually no proceeding in court can take place without the presence of counsel unless there is a clear, convincing, and unequivocal waiver thereof.

See also, *Carnly v. Cochran*, 369 U.S. 506, 514-516, 8 L.Ed.2d 70.

Moreover, the Supreme Court has held that the States must give every criminal defendant a reasonable opportunity to employ counsel. (*Chandler v. Fretag*, 348 U.S. 3,99 L.Ed.4, 10 *supra*).

In the case at bar, very little opportunity was given to obtain new counsel after it became known to the Court that Mr. Direnzo had been discharged.

Furthermore, it must be borne in mind that this petitioner is a paraplegic and could not get around as easily as the average individual, to say the least.

See also, *Anonymous v. Baker*, 360 U.S. 287, 3 L.Ed. 2d 1234, 79 S.Ct. 1157, 1164.

It has been held also that the accused has a right to have counsel present at the sentencing (*Stidhman v. Swope*, D C. Cal., 82 F.Supp. 931; *Martin v. United States*, C.A.5 Tex., 182 F.2d 225, 20 A.L.R.2d 1236, noted in 35 Minn.L.Rev., cert. den. 340 U.S. 392, 95 L.Ed. 674. See also, *Green v. Robbins*, D.C. Me., 120 F.Supp. 61 [aff'd. 1 Cir.], 218 F.2d 192).

In *Canizio v. New York*, 327 U.S. 82, 90 L.Ed. 545, reh. den. 327 U.S. 816, the Supreme Court noted that even though a person did not have counsel at the time of his plea of guilty, so long as he had counsel at a sentence there was no violation of Due Process because at sentence counsel could rectify any errors that may have occurred theretofore. Thus, in *Canizio* the court thought that "he had counsel in ample time to take advantage of every defense which could have been available to him originally."

In the case at bar, of course, no counsel was available at the time of sentence because Mr. Direnzo himself, as well as the petitioner, acknowledged that there was no longer an attorney-client relationship in existence.

In *Martin v. United States*, 5 Cir., 182 F.2d 225, 20 A.L.R.2d 1236, cert. den. 340 U.S. 392, the Fifth Circuit noted:

> "The very nature of the proceeding at the time of imposition of sentence makes the presence of defendant's counsel at that time necessary if the consitutional requirement is to be met. There is then a real need for counsel. The advisability of an appeal must then, or shortly, be determined. Then is the opportunity afforded for presentation to the court of facts in extenuation of the offense, or in explanation of the defendant's conduct; to correct errors or mistakes in reports of the defendant's past record; and, in short, to appeal to the equity of the court in its administration and enforcement of penal laws. Any judge with trial court experience must acknowledge that such disclosures frequently result in mitigation, or even suspension of penalty. That it is true that such discussion sometimes has a contrary result, does not detract from the fact that the nature and possibilities of this important stage of the proceedings are *such as to make the absence of counsel at this time presumably prejudicial*." (Emphasis ours.)

At the time of sentence there was no question whatsoever but that Mr. Direnzo, *petitioner's former attorney, told the Court that he did not represent the petitioner and that defendant petitioner was appearing without counsel.* As a matter of fact, around October 29th Mr. Direnzo indicated to the Court that he was being replaced, so the Court was aware of the fact several days prior to sentence.

We cannot perceive, from the record, what the precipitate haste was on the part of the Court to impose sentence on a severely crippled defendant, when it was obvious that he had no attorney, and said he could not afford one (*Gideon v. Wainwright*, 372 U.S. 335, 9L.Ed.2d 799).

What possible harm would have been done to anyone if even a week, two weeks, or a month continuance had been granted so that counsel could appear for the petitioner!?

The Court's view, supposedly, was that enough time had elapsed and it did not choose to grant any further adjournments. The Court, at page 12 of the sentencing minutes, states that it "declines to relieve Mr. Direnzo on the record. . ."(A116).

Unfortunately, the Court was unaware, or chose to ignore the fact that it was not the Court's privilege to determine who should represent the defendant.

In *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562; *Adams v. United States ex rel. McCann*, 317 U.S. 269, 87 L.Ed. 268; and *Moore v. Michigan*, 355 U.S. 155, 2 L.Ed.2d 167, the Supreme Court made it abundantly clear that counsel could not be forced upon a defendant.

In addition, the Supreme Court has made it equally clear that a defendant has a right to effective counsel (*Avery v. Alabama*, 308 U.S. 444, 84 L.Ed. 377; *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158; *Entsminger v. Iowa*, 386 U.S. 748, 18 L.Ed.2d 501; and, *Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 680).

In *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799, and *Argensinger v. Hamlin*, 407 U.S. 25, 32 L.Ed.2d 530, it was held that the right to counsel in both felonies and misdemeanors is inviolate and must be scrupulously honored by the Court.

As a matter of fact, *in Argensinger the Supreme Court held that no sentence involving loss of liberty can be imposed where there has been a denial of counsel.*

We believe, under the circumstances, that the Court committed clear reversible error. The stated lack of funds made it mandatory to conduct a full inquiry on this aspect (*Powell v. Alabama supra*).

(A)

THE COURT SHOULD HAVE GRANTED A FULL HEARING ON PETITIONER'S APPLICATION TO WITHDRAW HIS PLEA, ESPECIALLY BECAUSE OF A HULLABALOO WHICH ERUPTED IN COURT.

We have pointed out, *supra*,that during the course of the aborted trial a very traumatic and shocking incident occurred, when one of the victims of the alleged crime had an epileptic seizure in the courtroom in the presence of the jury, which, in turn, precipitated horrifying and frightening reactions from the alleged victim's parents and from other people in the courtroom, including shouting, banging with fists on the Court railing, and so forth.

The Court declined to grant a mistrial upon timely application. We maintain that under the circumstances, there should have been a mistrial granted, or at least a determination as to whether or not the petitioner could obtain a fair trial from that point on.

Be that as it may, the record indicates that that incident may very well have precipitated the plea of guilty of the petitioner to two counts of attempted murder second degree.

In *People v. Granello*, 18 N.Y.2d 823, the Court of Appeals made it quite clear that in dealing with the issue of the withdrawal of a plea of guilty, it is not sufficient for the Trial Court to note that the petitioner did not indicate any reservations when he answered the stereotyped questioning that takes place during such a plea. The fact that denials as to promises or misunderstandings are made, the Court of Appeals said, are not conclusive that they in fact were not made.

Thus, we maintain that the petitioner's statements at the time of the colloquy during the plea of guilty are insufficient to warrant denial of the relief of withdrawing his plea of guilty.

In *Hunter v. Fogg*, 470 F.Supp. 1041 (D.C. N.Y., 1979), rev'd. on other grounds, 616 F.2d 55, the Court held that the defendant's *pro forma* acknowledgement that he understood the sentencing scope and that there were no off-the-record promises about sentence, were not necessarily controlling. The Court indicated that where defendant seeks to withdraw the plea of guilty on the ground of a misunderstanding as to the sentencing possibilities, there must be careful review nevertheless made.

Thus, in the *Fogg* case, *supra*, the Court noted that there is a bases for withdrawal of such a plea.

See also, *People v. Twiggs*, 58 A.D.2d 726, 369 N.Y.S. 2d 277; *People v. Moore* (4th Dept.) 78 A.D.2d 997, 433 N.Y.S.2d 689; and *People v. Rogers* (1981, 1st Dept.), 81 A.D.2d 564, 438 N.Y.S.2d 338.

In *People v. Selikoff*, 35 N.Y.2d 227, 360 N.Y.S. 2d 623, cert. den. 419 U.S. 1122, the Court of Appeals noted, in this leading case, that plea negotiations serve laudable purposes.

Significantly, at page 235 of 35 N.Y.2d, 630 of 360 N.Y.S.2d, the opinion in *Selikoff* explains:

> "Where a defendant denies guilt, or if the court believes defendant may be innocent, and the guilty plea is not otherwise justified as knowing and intelligently made, the guilty plea may be and should be rejected [citing cases]."

In the case at bar, it is significant that the petitioner has denied his guilt on several occasions.

Since a defendant is entitled to go to trial if he in fact is not guilty and asserts that he did not intelligently and knowingly waive trial by pleading guilty, it is obvious that he should be permitted to have his plea back and go to trial. (See, e.g., *People v. Beasley*, 25 N.Y.2d 483, 307 N.Y.S.2d 39; *People v. Nixon*, 21 N.Y.2d 338, 351, 287 N.Y.S.2d 659, 668; *People v. Serrano*, 15 N.Y.2d 304, 258 N.Y.S.2d 386; and, *North Carolina v. Alford*, 400 U.S. 25, 31-39, 27 L.Ed.2d 162.)

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioner.

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS
BEFORE HON. BERNARD S. MEYER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

JOHN PUGIOTI,
Appellant.

CERTIFICATE DENYING LEAVE

I, BERNARD S. MEYER, Associate Judge of the Court of Appeals of the State of New York , do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at: Albany, New York
November 22, 1983

/s/ _____
Bernard S. Meyer

Order of the Appellate Division, First Department, entered September 27, 1983, affirming a judgment of the Supreme Court, Bronx County, rendered November 5, 1982, convicting defendant of attempted murder in the second degree.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 72, 1983

Present-Hon.
John Carro, Justice Presiding
Arnold L. Fein
E. Leo Milonas
Bentley Kassal
Fritz W. Alexander, II,
Justices.

The People of the State of New York,

Respondent,

– against –

John Pugioti,

Defendant-Appellant.

Order of Affirmance on Appeal from Judgment 17435

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Barry Salman, J.), rendered on November 5, 1982, convicting defendant of attempted murder in the second degree, and said appeal having been argued by Irving Anolik of counsel for the appellant, and by Roger L. Stavis of counsel for the respondent; and due deliberation having been had thereon.

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.